SUPREME COURT, U.S.
Office-Supreme Court, U.S.
FILED
SEP 8 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 110

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

No. 111

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONERS, NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

CHARLES B. MAHIN,
134 South La Salle Street,
Chicago, Illinois 60603,
Counsel for National Woodwork Manufacturers Association, et al.

Of Counsel:
RICHARD S. RATCLIFF,
JOHN A. MCDONALD,
SPRAY, PRICE, HOUGH & CUSHMAN,
Chicago, Illinois 60603.

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OPINIONS BELOW.

The Decision and Order of the National Labor Relations Board (herein the "Board") (R. 2) is reported in 149 NLRB 646 (1965). The opinion of the Court of Appeals (R. 156) is reported in 354 F. 2d 594 (7th Cir. 1965).

JURISDICTION.

The judgment of the Court of Appeals was entered on November 17, 1965 (R. 156). Timely motions for rehearing filed by Petitioners and the Board were denied on January 24, 1966 (R. 176). Petitions for certiorari, timely filed by Petitioners and by the Board, were granted on June 6, 1966. The jurisdiction of this Court rests on 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether a jobsite contractor's legal freedom ("control") to submit to a union's boycott of prefabricated products made by other employers immunizes boycott conduct otherwise violative of Section 8(b)(4)(B) of the National Labor Relations Act (herein the "Act").

Whether in a product boycott case a dispute between a union and a jobsite employer for an objective of work preservation conclusively negates the existence of a proscribed objective under Section 8(b)(4)(B) of the Act.

Whether the "primary strike or primary picketing" proviso, which was added to Section 8(b)(4)(B) in the 1959 amendments, validated product boycotts of a type theretofore unlawful under that section.

STATUTE INVOLVED.

The statutory provisions involved in this Cause No. 110 and in Cause No. 111 are Section 8(b)(4)(A) and (B) and Section 8(e) of the National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U. S. C. § 151, *et seq.*, which are as follows:

"Sec. 8. . . .

"(b) It shall be an unfair labor practice for a labor organization or its agents—

• • • • •

"(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce, where in either case an object thereof is:

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

* * *

"(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement

shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (a) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . ."

STATEMENT OF THE CASE.

This case involves a union[1] boycott in the Philadelphia area of prefabricated doors[2] manufactured by Petitioners[3] and others elsewhere.

Prefabricated doors are superior and have advantages in construction. They are used in a great many projects and, from a standpoint of aesthetics, cost and workmanship, are better than other doors (R. 54-56, 58-59, 82-83). Their use saves time and money.[4] Further, some prefabricated doors cannot practically be machined at the job (R. 101; cf. R. 112).

---

1. Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO (herein called the "Council" or the "Union").

2. Prefabricated doors are (R. 54-55, 57-58, 59, 101, 102, 111-112): (1) Prefitted doors which have been cut to exact size and beveled at the factory, so that they will fit into frame openings on the job without further machining; (2) precut doors which have been machined at the factory to receive hardware (locks, knobs, hinges, etc.), louvers, glass openings, and the like; (3) prefinished doors which have been fully finished at the factory for ultimate use (such doors must be completely machined before the final finish is affixed at the factory); (4) armored doors which are completely machined at the factory and have plastic or other wear-resistant materials laminated to surfaces and edges; (5) prehung doors which are machined and assembled in door-frame units at the factory. Doors which are not prefabricated are called "blank" or "blind" doors (R. 103).

3. National Woodwork Manufacturers Association (herein "NWMA"); Hardwood Products Corporation (herein "Hardwood"), Neenah, Wisconsin; Mohawk Flush Doors, Inc. (herein "Mohawk"), Sunbury, Pennsylvania, and South Bend, Indiana. Oxford Plastic Products Company (herein "Oxford"), Oxford, Pennsylvania, is not a petitioner, but its products are involved herein.

4. A door can be machined in a mill in 8 minutes and installed in a few more minutes (R. 96-98). A carpenter working by hand would take over an hour (at $4.20 an hour) to do this (R. 108).

The use of prefabricated doors has been greatly increasing in the construction industry, and this is true of numerous other building components, such as windows, factory-built trusses, wall and partition assemblies, prefinished paneling, prefabricated kitchens and bathrooms, and on up to the point of prefabricated houses and other buildings (R. 159).

Mohawk, which has plants at Sunbury, Pennsylvania, and South Bend, Indiana, makes flush doors and in the past year shipped 15,000 prefitted and 3,000 premachined doors into the Philadelphia area (R. 102-103). All doors shipped by Oxford into the Philadelphia area are prefabricated at the factory and armored with plastic laminations on four sides (R. 100-101). In the past year the United States Plywood Corporation shipped in excess of 6,000 prefabricated doors into the Philadelphia area (R. 104-105).

The Union's Boycott of Prefabricated Doors.

The Council exercises jurisdiction of carpenter work throughout the Philadelphia metropolitan area, which includes the five counties of Philadelphia, Bucks, Chester, Delaware, and Montgomery (R. 89). In this area the Council's jurisdiction and contracts are administered by a general business manager, 15 business agents who work directly under him, and 27 affiliated local unions (R. 89). The Council has contracts with the General Building Contractors Association (herein "GBCA"), which acts on behalf of contractor members, and with independent contractors in this area (R. 89, 110, 111, 112, 119, 121). Union members perform the carpentry work in the Union's jurisdictional area (R. 107). It is the job of the business agents to police the rules on construction jobs (R. 91).

The Council's contracts with the GBCA and individual contractors during the period here involved contained Rule 17, which reads as follows (R. 119):

"Rule 17.. No employee shall work on any job on which cabinet work, fixtures, millwork, sash doors, trim or other detailed millwork is used unless the same is Union-made and bears the Union Label of the United Brotherhood of Carpenters and Joiners of America. No member of this District Council will handle material coming from a mill where cutting out and fitting has been done for butts, locks, letter plates, or hardware of any description, nor any doors or transoms which have been fitted prior to being furnished on job, including base, chair, rail, picture moulding, which has been previously fitted. This section to exempt partition work furnished in sections."

Rule 17, by its terms and as enforced[5] by the Council, barred prefabricated millwork products, including prefabricated doors, from the Council's jurisdictional area (R. 86-87, 109-110, 111-112, 113). In February, 1963, Business Manager Gray wrote the general president of the United Brotherhood of Carpenters, Mr. Hutchinson, that there was a serious problem of precut and prefitted doors coming into the Philadelphia area (R. 155). This was followed by a Union drive to bar prefabricated doors, which was implemented by the boycotts and work stoppages that led to the NWMA charges against the Union and the proceedings below (R. 159).

The Boycott at North Junior High School.

In May, 1963, contractor John J. McDonnell, Inc. (herein called "McDonnell"), Upper Darby, Pennsylvania, purchased through the millwork distributor John A. Yohn Co., Ardmore, Pennsylvania, 235 to 250 architectural doors manufactured by Hardwood for use at the North Junior High School job in West Chester, Pennsylvania (R. 68, 69). The doors were factory-finished and ready to be hung, as called for by the specifications (R. 71).

5. Council Business Manager Robert H. Gray testified that the Union did not enforce the first sentence of Rule 17 (R. 23).

On May 23, after the doors had arrived at the job and about 15 doors had been hung, Union Agent Boyer called the contractor (who was a member of GBCA) and said that the carpenters would not be permitted to hang the doors because they were in violation of Rule 17 of the contract (R. 70, 74-75).

McDonnell then called Business Manager Gray, who confirmed that the carpenters would not handle the doors because of Rule 17. McDonnell said they were caught in a bind because they had a contractual obligation with the school to provide the doors specified, and the doors they were trying to install were exactly those specified by the architect. Gray suggested that a carpenter be timed cutting and fitting a blank door, and that this would become the standard for each door being hung (R. 70-71, 76). Gray said he did not care who paid the money—whether it was the contractor, the architect, or the owner. McDonnell was under a fixed-price contract and refused to pay the additional money, and the Union carpenters did not hang the doors (R. 71).

The Boycott at St. Aloysius Academy.

In May and June, 1963, contractor Nason & Cullen, Inc. (herein called "Nason"), Philadelphia, Pennsylvania, purchased through millwork distributor T. W. Hammonds, Bryn Mawr, Pennsylvania, 182 formica-clad "Ambas-A-Dor" doors manufactured by Oxford for use in the St. Aloysius Academy job in Philadelphia. These doors were all factory cut, laminated and finished, in accordance with the job specifications (R. 56, 60-61).

Approximately 170 doors were delivered to the job the latter part of May and the first part of June, 1963 (R. 61). After some of these doors had been delivered, Union Agent Boyer told Nason that the carpenters would not hang them

(R. 61-62). Thereafter the Union repeatedly refused to hang the doors, and they were still not hung at the time of the hearing below (R. 62-66).

The Boycott at Coatesville Hospital.

In May, 1963, contractor L. F. Driscoll Company (herein called "Driscoll") purchased 170 prefabricated architectural doors made by Hardwood for a hospital job at Coatesville, Pennsylvania. These were purchased through a millwork distributor, Boyertown Planing Mills, Boyertown, Pennsylvania (R. 79). In accordance with the architect's common practice, the specifications called for precut, prefitted and prefinished doors (R. 58-59, 117). On May 23, the day after the prefinished doors were delivered to the job,[5a] Union Agent Boyer prevented the hanging of the doors because of Rule 17 (R. 85-86); and this refusal was confirmed later by Gray, who said: "... no carpenters from now on will hang prefinished or pre-fit doors." (R. 80, 86-87.) Thereafter Gray told Driscoll that he could send the doors back or could pay the carpenters on the job a bonus for the work that would have been involved in fitting and cutting the doors for hardware (R. 80).

Because of the delay and the fact that the hospital had to be dedicated in ten days, Driscoll decided he had to go along and paid an exaction of about $4.25 to get each prefabricated door hung (R. 80-81, 108).

The Boycott at Naval Capehart Housing Project.

The Frouge Corporation (herein called "Frouge"), Bridgeport, Connecticut, was general contractor at the $6,000,000 Naval Capehart Housing Project in Philadelphia and was subject to Rule 17 under an agreement with the International Union to be bound by local rules (R. 10).

5a. These doors bore United Brotherhood of Carpenters' union labels (R. 79-80).

For this job Frouge ordered 3,600 factory-machined Mohawk doors through the millwork supplier Baldwin Lumber Company, Inc. The Government's specifications did not require factory-machined doors, but Frouge ordered such doors to save time and cost on the large project (R. 93, 97-98). After Frouge had received its second shipment of doors (totaling approximately 665), Union Agents Goldstein and Kane came out to the project and said carpenters would not install the prefinished doors because of Rule 17 (R. 94). Frouge finally capitulated to Union pressure and ordered 665 blank door replacements, which were then installed. The original prefabricated doors, which had already been varnished, were shipped to Bridgeport, Connecticut (R. 95).

The Decision of the Board.

The Trial Examiner found that the Union's boycott of prefabricated doors on the Driscoll, McDonnell and Nason jobs was for a proscribed objective in violation of Section 8(b) (4) (B) (R. 28). He stated (R. 29):

> "Thus, the real targets of the District Council's conduct were the respective owners of the three projects, the mill suppliers, and the door manufacturers. The three general contractors, Nason, McDonnell, and Driscoll, were in these instances the secondary targets against whom the pressure was directed in the form of refusing to hang the precut and prefit doors in an effort to achieve the other objectives."

However, the Trial Examiner found that the Union's boycott of prefabricated doors on the Frouge job was not for a proscribed objective and did not violate Section 8(b)(4)(B) of the Act. He said (R. 30, ftnt. 21):

> "[21] I find that the District Council and its agents, Kane and Goldstein, have not violated these sections of the Act with respect to the fourth general contrac-

tor, Frouge. On this project, the primary dispute was with Frouge because this contract[or] had control over the assignment of the work of cutting out and fitting doors and therefore was in a position to, as in fact he did, settle the dispute with the District Council by granting its request to assign that work to the carpenters on the job-site."

The only difference between the situations on the first three jobs, which the Examiner found violative of Section 8(b) (4) (B), and the situation on the Frouge job, where the Examiner found no violation, was that the prefabricated doors were specified by the owners on the first three jobs, whereas the prefabricated doors were not specified by the owner on the Frouge job. This result was reached by application of the Board's new "control" rationale—*i.e.*, since the prefabricated doors were permitted but not required on the Frouge job, Frouge, and not the prefabricated doors or the manufacturers and distributors of them, was conclusively deemed to be the sole target of the Union. The Board summarily adopted the Trial Examiner's decision (R. 3). The Board also adopted the Trial Examiner's decision that Rule 17 was only a "work preservation" rule and, as such, did not violate Section 8(e) of the Act. The Board having so found, it followed that the Union's boycott to obtain and maintain Rule 17 did not violate Section 8(b) (4) (A).

The Decision of the Court Below.

The Court affirmed the Board's holding that the Union's enforcement of Rule 17, by its boycott of prefabricated doors on the Driscoll, McDonnell and Nason jobs, violated Section 8(b) (4) (B) (R. 162-165). The Court expressly found that the "Union's target was and is prefabricated doors" and, in finding violation, likened the boycott carried on by the Union under Rule 17 to the area product boy-

cotts involved in the *Allen Bradley*[6] and the *Joliet Contractors*[7] cases (R. 162-163):

"The language of the statute and its legislative history clearly indicate that § 8 (b) (4) (B) applies to the product boycott carried on by the Union in this case under its rule 17. In *Allen Bradley Co.* v. *United States*, 325 U. S. 797 (1945), it appeared that Local 3 of the Electrical Workers Union and the Electrical Contractors of New York City had agreed on work rule restrictions, under which Local 3 refused to handle or install electrical fixtures and equipment made or assembled outside the New York City area. It was agreed that, in lieu of absolute prohibition, the union would dismantle and rebuild the 'foreign' equipment or be paid the equivalent thereof. Local 3 had no active labor dispute with the 'foreign' manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the 'foreign' fixtures were union made—in fact, it barred fixtures made by its sister local union in New Jersey. Further, Local 3 was not concerned with whether the immediate contractor had or did not have 'control of [fol. 162] the work.' Clearly, the union's ultimate objective was to preserve work for its members. The intermediate objective, as the means to its ultimate goal, was the boycott of foreign products. It was the inadequacy of antitrust remedies, demonstrated in *Allen Bradley, supra*, that led directly to the Taft-Hartley prohibition of secondary boycotts.

"Our own court in *Joliet Contractors Association* v. *National Labor Relations Board*, 202 F. 2d 606 (1953), cert. den. 346 U. S. 824, considered an area boycott similar to that in *Allen Bradley*. It was a typical product boycott case. . . ."

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6. *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945).

7. *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (7th Cir. 1953), cert. denied 346 U. S. 824 (1953).

"In the case at bar the Union's target was and is prefabricated doors. Neither here nor in *Joliet Contractors* was there a labor dispute between the union and any manufacturer. In *Joliet Contractors* we found the union's refusal to install such products to be a violation of § 8 (b) (4) (A). . . ."

Despite its finding that the Union's target on the first three jobs was clearly the prefabricated doors, the Court, without amplification or discussion, seems to have adopted summarily the Board's "control" rationale. The Court said (R. 161, 162):

"The Board held that the Union violated § 8(b)(4)(i)(ii)(B), by reason of its boycott of prefabricated doors on the Coatesville, North Junior High and St. Aloysius jobs, but as to Frouge, it held otherwise, giving as its reason, that, while in the first three jobs the specifications called for prefabricated doors and hence the Union target was the doors and persons making and distributing them, in *Frouge* the Union boycotted prefabricated doors which had been purchased by the contract—but which were *not required* by job specifications. This conclusion seems to indicate that the Board held that the Union's target in *Frouge* was not the prefabricated doors and their manufacturer but rather contractor Frouge and that the situation involved only a primary dispute with him. We agree."

* * * * *

"We hold that Frouge was the object of a 'primary strike or primary picketing' and therefore the Union was entitled to the protection of the proviso in § 8(b)(4)(B)."

The validity of this artificial "control" distinction is the crux of the question of which Petitioners seek review.

The Court, however, reversed the Board's Section 8(e) finding of no violation and held that Rule 17 was an unlawful agreement whereby the employer "ceases or re-

frains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer. . . .'' The Court expressly pointed out that Section 8(e) and the construction proviso were not intended to immunize union boycotts of products manufactured elsewhere for installation at construction sites. The Court said (R. 166):

> ''The distinction between job site work and factory-made products is recognized in the foregoing construction proviso of § 8(e) itself. The legislative history shows that it was explained by Senator Kennedy that the 'proviso does not cover boycotts of goods manufactured in an industrial plant for installation at the jobsite.'''

As stated, Petitioners in this Cause No. 110 seek reversal of that part of the Court's judgment finding that the Council's boycott of prefabricated doors on the Frouge job did not violate Section 8(b)(4)(B). The Board in Cause No. 111 seeks reversal of that part of the Court's judgment finding that the agreement between the Philadelphia contractors and the Council, embodied in Rule 17, violated Section 8(e), and that the enforcement of it violated Section 8(b)(4)(A). By arrangement, Petitioners and the Board, in their initial briefs, will support respectively the positions asserted by their petitions for certiorari. Each will then file a brief responsive to the other's brief.

SUMMARY OF ARGUMENT.

(1) The Union engaged in a boycott campaign to eliminate the use of prefabricated doors in the Philadelphia area through the enforcement of Rule 17. This rule prohibited the installation of prefabricated doors within the Union's jurisdiction. The Court below correctly found that the Union's boycott of doors on the Driscoll, McDonnell and Nason jobs violated Section 8(b)(4)(B) because the Union's proscribed objective was that of banning prefabricated doors manufactured by other employers. The Court erroneously failed to find unlawful a like boycott of prefabricated doors on the Frouge job because of misplaced reliance on the Board's newly conceived "control" theory.

(2) The fallacy of the Board's new concept is that it makes the incidental factor of "control" by the immediate employer (legal freedom to capitulate to the Union's boycott demands) determinative that the boycotting union has only a lawful objective—despite the existence of proscribed objectives. Thus, as applied herein, "control" by contractor Frouge was deemed determinative *per se* that the Union's sole target was Frouge and work preservation. In so holding, the Board and the Court below, as a matter of law, foreclosed consideration of the Union's existent proscribed objective to boycott prefabricated doors.

This disregard of the Union's demonstrated boycott objective is contrary to the language of the Act and to the legislative intendment. Given requisite inducement or coercion, the existence of "*an* object" to require any "person" to cease "using, selling, handling, transporting, or otherwise dealing in the products of any other producer . . . " is determinative of violation. Frouge was a "person" and the prefabricated doors which the Union boycotted were made by other "producers" (at distant fac-

tories) within the meaning of the statute. Moreover, the legislative history demonstrates conclusively that Congress intended to outlaw the type of product boycott involved on the Frouge job. Product boycotts, under the antitrust laws, had a long history of illegality until 1932 and of legality thereafter until 1947. It was the demonstrated inadequacy of the antitrust laws to prevent product boycotts by unions that led to the enactment of Section 8(b)(4)(A) (now "(B)"). It is evident from the many references to *Allen Bradley Co.* v. *Local Union No. 3, IBEW*, 325 U. S. 797 (1945) in the legislative reports and the debates that it was the definite intention to outlaw product boycotts such as were involved in that case and in the present case, and that union self-interest would not be a defense to such boycotts.

From 1947 until the Board's newly conceived "control" notion, the courts and the Board faithfully effectuated the statutory mandate that (given requisite inducement, etc.) the existence of *a* proscribed objective is determinative of violation. *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951). It was consistently so held whenever a boycotting union prevented an employer from handling or using products *manufactured by other employers*, whether the boycotting union banned the forbidden products because it had a labor dispute with the manufacturer, or because the products were made by the wrong union or no union, or because the products were prefabricated or made outside the boycotting union's jurisdiction. In these cases, it was held that union motivations of self-interest, such as work preservation, were not defenses because the unions had also proscribed boycott objectives.

The fallacy of the "control" concept is particularly apparent from its application in the present case. It was by the enforcement of Rule 17 on all four jobs that the Union

prevented the use of prefabricated doors on all such jobs. The Union had the same boycott objective on the Frouge job as on the other three. The only way the Union's goal could be accomplished was to force Frouge to stop using prefabricated doors—which it did. This was *a* proscribed objective under the statute, and it is the union's boycott objective which is determinative of violation—not the legal freedom of the immediate employer to capitulate.

(3) The "control" limitation which the Board seeks to write into Section 8(b)(4)(B) would open a new wide loophole of immunity for unions bent on the boycott of prefabricated products. By requiring contractors to operate under "open" specifications, unions could resume the product boycotts condemned in *Allen Bradley, Joliet Contractors,*[8] *General Millwork,*[9] and similar cases. Unions throughout the country would be enabled to draw boycott walls around their respective communities, banning technologically improved products and construction methods to the great detriment of the economy and the public interest.

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8. *Joliet Contractors Association* v. *NLRB*, 202 F. 2d 606 (7th Cir. 1953), cert. denied 346 U. S. 824 (1953).

9. *NLRB* v. *Local 11, etc.*, 242 F. 2d 932 (6th Cir. 1957).

ARGUMENT.

The Union in this case engaged in a comprehensive boycott campaign to eliminate the use of prefabricated doors in the Philadelphia construction area. Union Rule 17 expressly and bluntly prohibited the installation of prefabricated doors within the Union's jurisdiction.

This was a typical form of product boycott which, until the Board's newly conceived "control" theory, was consistently held illegal under the Taft-Hartley Amendments to the Act (1947).[10]

An offense under Section 8(b)(4)(B)[11] (*supra*, p. 2) embodies two basic elements: (1) union inducement of an employee or coercion of an employer (2) for *an object* of requiring any person *to cease handling the products of another processor or manufacturer* or to cease doing business with any other person.

It is not disputed that element (1) was satisfied on all four jobs (including Frouge) in that the Union induced the employees and coerced the employers not to handle prefabricated doors on such jobs. Further, the Board and the Court below held that element (2) was satisfied on the first three jobs in that the Union's objective was to force or require the contractors not to handle prefabricated doors made by others (R. 163).

The only pending 8(b)(4)(B) question, therefore, is whether on the fourth job the Union also had *an* objective

10. The marked change in the thinking of the Board is illustrated by the fact that the General Counsel for the Board, in accordance with his understanding of the law only three years ago, filed the complaint and prosecuted the case before the Board on the ground that the Union's boycott on the Frouge job, as well as on the other jobs, violated Section 8(b)(4)(B).

11. Section 8(b)(4)(A), enacted in 1947, was changed to Section 8(b)(4)(B) by the 1959 amendments. Except as noted, context references herein will be to Section 8(b)(4)(B).

to require Frouge not to use prefabricated doors.[12] Inescapably this question must be answered in the affirmative, unless the Board's new "control" formula dictates a finding that it was not a Union object to prevent the use of such doors and that the Union had *solely* a different target—i.e., Frouge and work preservation.

The Board's rationale of this new immunity for product boycotts, as applied herein, is that if the immediate employer of the boycotting employees has "control" of the purchase (that is, the legal right to buy or not buy the forbidden product), this employer will be deemed conclusively to be the Union's target, and the Union's *sole* objective will be deemed to be work preservation. Thus, a finding of "control" in the immediate employer *per se* precludes and negates consideration of other existing objectives. As a result, even if the evidence shows that an actual objective of a union was an embargo of prefabricated products and that this objective was actually accomplished, "control" in the immediate employer under this new concept will dictate a finding that the union's sole objective was work preservation, and that only a primary dispute was involved (R. 30, ftnt. 21).

This new product boycott immunity, which the Board seeks to write into the Act, is contrary to the express language of the statute and the legislative objectives.

12. There were more than 600 prefabricated doors on the Frouge job, finished and ready for installation, at the time of the Union's refusal to install them (R. 95).

A. THE UNION'S BOYCOTT OF PREFABRICATED DOORS ON THE FROUGE JOB VIOLATED SECTION 8(b)(4)(B), IRRESPECTIVE OF FROUGE'S LEGAL FREEDOM TO COMPLY WITH THE UNION'S BOYCOTT DEMAND.

1. The Language of Section 8(b)(4)(B) Is Aimed Precisely at the Type of Product Boycott Carried on by the Union Under Rule 17.

The boycott objective proscribed by Section 8(b)(4)(B) is that of—

> "(B) forcing or requiring *any person to cease using, selling, handling,* transporting, or *otherwise dealing in the products of any other producer, processor, or manufacturer,* or to *cease doing business* with any *other person*. . . ." (Emphasis added.)

This language is plain and unambiguous. Frouge is a "person," and the prefabricated doors which he was required to stop using were "products" manufactured by other employers. There is nothing in the statute nor in the legislative history that refers to, or would make the application of this section conditional on, the legal right or the ability or power of Frouge, the immediate employer, to capitulate to the Union's boycott demands. Neither is there anything in the Act or the legislative history which warrants the view that a motivation of work preservation or any other form of self-interest immunizes union coercion of an employer to boycott products manufactured by others. On the contrary, congressional consideration of product boycotts and pronouncements regarding the historic evolution of product-boycott law and the circumstances that led directly to the enactment of the Taft-Hartley Act make it abundantly clear that Section 8(b)(4) was, *inter alia,* directed to the elimination of product boycotts such as are involved herein.

2. The Pre-Taft-Hartley Antitrust Cases Demonstrated the Need for, and Led Directly to the Enactment of, Section 8(b)(4)(B).[13]

Although Section 8(b)(4) is a labor law and not an antitrust law, its roots are grounded in antitrust law, and the antitrust background from which it emerged casts light on its intended proscriptions.

From the enactment of the Sherman Act in 1890 to the passage of the Taft-Hartley Act in 1947 and thereafter, the courts have been concerned with two congressional objectives—one which seeks to preserve a competitive business economy; and the other which seeks to preserve the rights of labor to better its conditions. The courts were repeatedly called upon to determine how far Congress intended the activities under one of these policies to neutralize the results envisioned by the other.[14] Many of these judicial determinations involved so-called "secondary boycotts," most of which were "product" boycotts.[15] Although "secondary boycott" is not a precise term[16]

13. Before 1959, "(A)."

14. *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, 806 (1945).

15. Many of these cases were referred to in the *Allen Bradley* case and in the reports and legislative debates on the Taft-Hartley Act, 93 Cong. Rec. 398, 427, 428, 832, 1104, 1105, 1213, 1354, 1357, 1358, 1362, 1397, 1537, 1622 (1947).

16. Koretz, *Federal Regulation of Secondary Strikes and Boycotts—A New Chapter*, 37 Cornell L. Q. 235 (1952):

> "Seldom, if ever, has any term in American law proved more elusive of precise definition or suggestive of greater conflict of judicial and legislative opinion than the term 'secondary boycott.' The Taft-Hartley Act reflects a legislative opinion that concerted labor activity usually characterized by this term merits blanket condemnation. Congress wisely avoided use of the term in drafting the relevant provisions. . . ."

Labor Law—Taft-Hartley Act—The "Secondary Boycott" Provisions, 26 N. Y. U. L. Q. Rev. 694 (1952):

> "Prior to the passage of the act, the essential elements of an

(and is not used in the present Act), it was commonly employed by the courts and Congress to describe, *inter alia*, product boycotts in which a union (usually motivated by self-interest) applied economic pressure on employer B to force him to stop handling the products of employer A or someone else.

A common form of "secondary boycott" involves an actual labor dispute between a specific "primary" employer and a union which boycotts a so-called "secondary" or "neutral" employer with whom the "primary" employer does business. However, many secondary boycotts do not involve any labor dispute between the boycotting union and any specific "primary" employer or group of employers. In numerous product boycott cases, the boycotting union banned products because they were made by some other union or no union at all, or because they were prefabricated or made outside the local union's jurisdiction. These various forms of product boycotts were known and referred to in the cases and by Congress as "secondary boycotts" for the reason that the union was boycotting one employer to make him stop handling products manufactured by another employer.[17]

Secondary boycott law, which eventuated in the Taft-Hartley Act, passed through three statutory periods.[18]

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illegal 'secondary boycott' had not been defined with precision by the courts or legislatures. Because of this indefiniteness, Congress did not mention 'secondary boycotts' in the Act, but instead proscribed specific types of union activity."

IV *Restatement of the Law of Torts* 152, The American Law Institute (1939):

"That phrase ["secondary boycott"] has such an uncertain meaning and is so frequently applied to such diverse situations that it is not used in the Restatement of this Subject. . . ."

17. This is the exact description of the conduct proscribed by the Act.

18. 1890-1914 (Sherman Act alone); 1914-1932 (plus Clayton Act); 1932-1947 (plus Norris-LaGuardia and Wagner Acts).

Union efforts to include a specific exemption for labor activities in the Sherman Act failed,[19] and after the enactment in 1890 of this Act[20] until 1914, the courts rigorously restricted practically all forms of boycotts and union activity which substantially blocked trade and commerce. In the famous *"Danbury Hatters"* case,[21] the United Hatters Union, in furtherance of an organizational campaign against hat manufacturers, engaged in a secondary boycott against the products of the resisting manufacturers and their customers. The Court rejected the union's contention that the interference with commerce was only indirect and was justified by the union's self-interest and organizational objectives, and held that the boycott was an unlawful restraint of trade.

Danbury Hatters and other decisions in this period[22] led to a legislative attempt, through the Clayton Act,[23] to exempt from the antitrust laws union activity in furtherance of "legitimate objects" and to prohibit the federal courts from issuing injunctions in disputes growing out of "labor disputes concerning terms or conditions of employment." Although proponents contended that the Clayton Act would not legalize secondary boycotts and opponents expressed fear that it would, neither supported secondary boycotts as a justifiable union weapon.[24]

The proponents proved to be right. In a series of decisions betwen 1914 and 1932, this Court and lower federal

19. 21 Cong. Rec. 1765, 2561, 2612, 2727-29, 4089, 6314 (1890).

20. 26 Stat. 209 (1890), 15 U. S. C. §§ 1, 2.

21. *Loewe* v. *Lawlor*, 208 U. S. 274 (1908).

22. *United States* v. *Workingmen's Amalgamated Council of New Orleans*, 54 Fed. 994 (C. C. E. D. La., 1893), affd. 57 Fed. 85 (5th Cir. 1893); *cf. In re Debs*, 158 U. S. 564 (1895); *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418 (1911).

23. Ch. 323 §§ 6, 20, 38 Stat. 731, 738 (1914), 15 U. S. C. § 17; 29 U. S. C. § 52.

24. 48 Cong. Rec. 6421, 9082, 9652, 9654-58 (1914).

courts strictly limited the application of the Clayton Act to situations involving disputes between an employer and his own employees and struck down secondary boycotts as unlawful restraints of trade.

Duplex Printing Press Company v. *Deering*, 254 U. S. 443 (1921), involved the common form of "secondary boycott" in which the union had a specific organizational dispute with a single Michigan employer, the Duplex company. The union engaged in a comprehensive product boycott in New York City and elsewhere against those who used or serviced Duplex printing presses. This Court held that the union's boycott restrained trade under the Sherman Act, and that the lawfulness of the union's effort to further its self-interest by organizing Duplex employees was not a defense. The Court said (pp. 465-466): "... although the purpose be lawful it may not be carried out by criminal or unlawful means."

Duplex was followed by *Bedford Cut Stone Company* v. *Journeymen Stone Cutters' Association*, 274 U. S. 37 (1927), in which union stone cutters in Chicago and elsewhere refused to handle or install the products of 24 Indiana manufacturers of precut and prefabricated building stone, whose employees belonged to a different union or no union at all. The Court held that this boycott violated the antitrust laws because it was essentially the same kind of boycott held illegal in *Duplex*.

Following *Duplex* and *Bedford*, this Court in 1931 affirmed *per curiam*[25] the District Court's decision in *United States* v. *Painters' District Council No. 14, etc.*, 44 F. 2d 58 (N. D. Ill. 1930), holding that a Chicago union's boycott of mill-fabricated and finished kitchen cabinets, store fixtures and woodwork manufactured by employers elsewhere

25. *Painters District Council No. 14 of Chicago* v. *United States*, 284 U. S. 582 (1931) (referred to herein as the "Kitchen Cabinet" case).

unlawfully restrained trade under the Sherman Act. This was a typical area product boycott. The Chicago union had no dispute with any particular manufacturer or group of manufacturers, except in the sense that the manufacturers were finishing in the factory cabinets and woodwork which the union desired to finish in Chicago. The boycotting union did not want to organize the out-of-state employers, and it cared nothing about their union or non-union status or their working conditions. The union's contention that it was involved only in a local dispute with local contractors was rejected. The Court pointed out that the inescapable effect of the union's local action was the embargo of finished products manufactured elsewhere. The Court said (pp. 60-61):

> "... the defendants in order to achieve a certain local result were in fact directly interfering with the shipping in of cabinets from Indiana and woodwork from Kentucky; *that although their purpose may have been entirely local in character, their actions in attempting to achieve that purpose necessarily and directly resulted in keeping out of the state of Illinois such finished articles as had previously been shipped from Indiana and elsewhere....*" (Emphasis added.)

The Court held that *Bedford Cut Stone* was directly applicable to this form of product boycott, stating (p. 61):

> "The defendants effected a practical boycott upon the articles manufactured and shipped from Indiana and attained their announced and recorded purpose of preventing the shipment of the same to the state of Illinois. The court is unable to distinguish this situation from the one of *Bedford Cut Stone Co.* v. *Stone Cutters' Ass'n....*"

The unions again went to Congress and this time had greater success. The Norris-LaGuardia Act,[26] enacted in

26. 47 Stat. 70 (1932), 29 U. S. C. § 101.

1932, in effect was held to overrule prior court decisions which had limited the area of permissible economic action by unions to existing employer-employee relationships. As construed in the decisions between 1932 and 1945, Norris-LaGuardia, interlaced with the Sherman and Clayton Acts, was held to have validated virtually all forms of economic action by unions in furtherance of their self-interests, including product boycotts and other forms of secondary boycotts.[27]

This new broad antitrust immunity for unions was given emphatic recognition by this Court's decision in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940). There a union trying to organize Apex engaged in a violent "sit-down" strike. The plant was seized, many products were destroyed, and gross acts of sabotage occurred. It was held that, despite this conduct and the resulting interference with trade and commerce, there was no violation of the Sherman Act because the union was acting on its own, in furtherance of its own self-interest, and the effect on commerce (no shipment of products from the struck plant) was only indirect and not substantial.

In *United States* v. *Hutcheson*, 312 U. S. 219 (1941), this Court more specifically spelled out the broad scope of the unions' antitrust immunity. That case involved a strike and boycott by the St. Louis Carpenters Union against Anheuser-Busch and certain construction companies, in furtherance of the Carpenters Union's jurisdictional dispute with the Machinists Union. Reading the Sherman, Clayton and Norris-LaGuardia Acts together, the Court found no violation of the Sherman Act. The Court said (p. 232):

> "So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any

27. American Bar Association, *Report of the Committee on Antitrust and Labor Relations Law*, pp. 22-41 (1966).

judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. . . ."

Following *Hutcheson*, this Court affirmed *per curiam*[28] *United States* v. *Carrozzo*, 37 F. Supp. 191 (N. D. Ill. 1941) (referred to herein as the "Pre-mixed Concrete" case), in which the Court held that a product boycott by the Hod Carriers Union did not violate the Sherman Act. In that case the union, to preserve manual work on jobsites, successfully boycotted pre-mixed concrete and truck mixers throughout the Chicago area.[29] This was another typical area product boycott. The union had no dispute with pre-mixed concrete producers or manufacturers of mixing trucks. It sole objective was to retain and obtain hand-mixing cement work. Following *Hutcheson*, the Court held that the union's boycott was in furtherance of its own self-interest and, therefore, nonviolative of the Sherman Act.

Thus, at the time of this Court's decision in the landmark case of *Allen Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797 (1945), the unions enjoyed broad secondary-boycott immunity from the antitrust laws, regardless of the adverse impact such boycotts had on trade and commerce and on the public interest.

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28. *United States* v. *International Hod Carriers Union and Common Laborers' District Council, et al.*, 313 U. S. 539 (1941).

29. The Court explained the utility of these products as follows (pp. 192-193):

"The use of truck mixers in street paving and building construction has become an approved engineering practice and has resulted in the elimination of waste of material, in savings of labor costs through reduction in the number of men employed, in lower cost concrete to the consumer, and in a better and more uniform quality of concrete. While truck-mixers make for better and cheaper concrete, and are in general use in metropolitan areas throughout the United States, they are not used in the Chicago area.

Allen Bradley was concerned with an area product boycott in which Local No. 3 of the Electrical Workers Union and nonlabor factors (manufacturers and contractors) combined to prevent the handling and installation in New York City of electrical fixtures made or assembled outside the New York City area. As an alternative to absolute prohibition, the union would dismantle and rebuild the "foreign" equipment or be paid for the equivalent time. Local No. 3 had no labor dispute whatever with the "foreign" manufacturers, nor did it have any interest in the working conditions at such factories. It was not concerned with whether the "foreign" fixtures were union-made—in fact, it barred fixtures made by members of its own sister union in New Jersey.[30] Admittedly the union was motivated by the self-interest of making and preserving work for its members. This Court stated at page 800 that a major objective of the union and its fellow conspirators was "to bar from the area equipment manufactured outside its boundaries." It was held that the union, acting in combination with employers, violated the Sherman Act.[31]

30. *Ibid.* pp. 798-799; *Allen Bradley Co.* v. *Local Union No. 3, etc.*, 41 F. Supp. 727, 733 (S. D. N. Y. 1941):

> "The objective of the combination and the conspiracy was not to carry on the unionization, or any change or improvement in working conditions in the factories of the plaintiffs outside of New York State. In the case at bar, business manager Van Arsdale and his associates frankly stated that they were in no way concerned with the working conditions, the rate of wages or the union affiliations of the plaintiffs' factories. It was immaterial to them whether members of other locals of their own union were employed by the plaintiffs."

31. Similarly, in March, 1947, shortly before Taft-Hartley was enacted, this Court in *United Brotherhood of Carpenters, etc.* v. *United States*, 330 U. S. 395 (1947) (referred to herein as the "Mill-Patterned Woodwork" case), on the merits agreed with the Ninth Circuit that an area product boycott by the Carpenters Union in the San Francisco area against out-of-state mill patterned woodwork and lumber violated the Sherman Act—but only because of collaboration with nonlabor entities.

The significant dictum, however, that triggered the Taft-Hartley boycott amendments was that similar boycott conduct by the union, *acting alone,* would be immune from the antitrust laws.[32]

3. Congress Intended Section 8(b)(4)(B)[33] to Apply to Product Boycotts Such as the Union Enforced Under Rule 17 in This Case.

Section 8(b)(4)(B)[33] resulted from legislative realization of the inadequacy of the antitrust laws to prevent the types of union boycotts and restraints involved in *Allen Bradley* and earlier boycott cases.[34] Congress became convinced that union self-interest should no longer justify the injury to the competitive economy resulting from union use of the secondary boycott weapon, and by its enactment of Section 8(b)(4), it intended to outlaw all forms of secondary boycotts—i.e., situations where the union has a specific dispute with employer A and boycotts employer B to put pressure on A (as in *Danbury Hatters* and *Duplex*); situations in which the union objects to the products of others because they are made by members of another union or no union (as in *Bedford Cut Stone*); and situations in which the union boycotts the products of other employers because they are foreign or prefabricated products (as in the *Kitchen Cabinet*, the *Pre-mixed Concrete*, the *Mill-Patterned Woodwork* and the *Allen Bradley* cases).

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32. At page 810, it was stated:

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. This, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress. . . ."

33. Prior to 1959, "A."

34. See Senator Taft's statement in Appendix, p. 60, 93 Cong. Rec. 3834 (1947).

The essence of all these secondary boycotts was that the union sought to gain its ends by forcing a local employer to boycott products manufactured by other employers.[35]

During the congressional consideration of Section 8(b)(4), much criticism was directed against the common form of secondary boycott, in which the union has a specific dispute with employer A and tries to put pressure on A by boycotting employer B, with whom A does business. However, the most prominently cited example of the type of boycott activity at which the statute was directed was the Electrical Workers' product boycott in the *Allen Bradley* case.[36] Senate Report No. 105 on S. 1126 (which, with minor changes, became the law), stated:[37]

> "Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling,

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35. The legislative intention to proscribe product boycotts of this kind was stated in House Conference Report No. 510, as follows:

> "Section 301 of the House bill contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies in restraining of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, *or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity. . . . Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement.*" (Emphasis added.) H.R. Conf. Rep. No. 510 on H.R. 3020, I Legislative History of the Labor Management Relations Act of 1947, p. 569 [hereinafter cited as "Leg. Hist. (1947)"].

36. Appendix, pp. 58-67; 93 Cong. Rec. 4132, 4198-99, 4837, 5011, 6296 (1947).

37. S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess., p. 22; I Leg. Hist. 428 (1947).

transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute). *This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by Local No. 3 of the IBEW*, whereby electricians have refused to install electrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See testimony of R. S. Edwards, vol. 1, p. 176 et seq.; *Allen Bradley Co. v. Local Union No. 3, I. B. E. W.*, 325 U. S. 797.)"[38] (Emphasis added.)

Allen Bradley was concerned with an area product boycott closely paralleling that of the present case. *Boycotting Local 3 had no labor dispute whatever with the "foreign" manufacturers, nor did it have any interest in the working conditions or union status at such factories.* Further, Local 3 was not concerned with whether the immediate contractor had or did not have "control of the work" (R. 162). Clearly, the union's ultimate objective was to preserve work for its members. However, as in the present case, the intermediate objective, as the means to its ultimate goal, was the boycott of foreign products.[39] And as

38. See excerpts from R. S. Edwards' testimony, Appendix, pp. 65-67.

39. Senator Ellender, a leading proponent of the Act, described this boycott as follows (R. 128):

"Another example is the New York Electrical Workers Union, the IBEW. That union has become so powerful that it has organized not only those who make the electrical equipment but those who receive it from the factory and install it. As a matter of fact, no employer who manufactures electrical equipment outside of New York has a ghost of a

stated, it was the demonstrated inadequacy of antitrust remedies in *Allen Bradley* that led directly to the Taft-Hartley prohibition of secondary boycotts.

It is true, of course, that in *Allen Bradley* there was a widespread conspiracy by nonlabor groups and Local No. 3 to fix prices, control production, and monopolize and restrain trade in the New York area—all of which was held to violate the Sherman Act. *However, the thrust of the case in its impact on congressional thinking was the dictum that the union, acting alone, could continue its embargo of foreign products with full antitrust immunity.*

It is of significance that Taft-Hartley opponents voiced little objection to the outlawing of product boycotts, such as in *Allen Bradley*[40] (and the present case). Rather, they

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show of having his equipment placed in the large buildings in New York City. When such equipment is sent to New York City, the IBEW local refuses to install it unless it is permitted to tear all the equipment apart and assemble it again. Of course, one can readily understand that such procedure is unconscionable and that it results in high costs to those engaged in the erection of office buildings, homes, and stores; in fact, all sorts of buildings requiring electrical equipment." II Leg. Hist. 1056 (1947), 93 Cong. Rec. 4132.

40. Even before Taft-Hartley, the indefensibility of local union boycotts of prefabricated or foreign products was recognized. Gromfine, *Labor's Use of Secondary Boycotts*, 15 Geo. Wash. L. Rev. 327, 345 (1947):

"Secondary boycotts whose objectives are higher wages, shorter hours, better working conditions, and the strengthening of labor organizations are as justifiable as strikes for similar objectives. On the other hand secondary boycotts to further jurisdictional disputes, *or which seek to put artificial barriers on production and trade (e.g. boycotts designed to prevent the use of a labor saving device, or to foster a local monopoly in the production of a product) cannot be defended.*" (Emphasis added.)

Cavers, *Labor v. The Sherman Act*, 8 U. Chi. L. Rev. 246, 256 (1941):

"These [antitrust product boycott cases] are the cases where

argued that the Act went too far in banning what they claimed were justifiable boycotts, such as boycotts against nonunion goods or "sweat shop" conditions[41]. Congressman Javits, a vocal opponent of the Act, stated [I Leg. Hist. 876 (1947), 93 Cong. Rec. 6296]:

> "Under the extremely wide definition of boycotts in the bill, unions cannot protect themselves against strikebreaking within the same industry. . . . *This is not the kind of boycott which is contrary to the public interest, that other kind results from a misguided labor union's efforts to keep certain goods out of a market of new inventions or new methods. But while dealing with this legitimate abuse, the bill also has the effect of depriving labor of a right of self preservation which has never been questioned before.*" (Emphasis added.)

In addition to the many expressions of legislative intention, to make it certain that unions could no longer claim lawful self-interest objectives as justification of secondary boycotts (such as had been condoned in pre-Taft-Hartley cases), the bill was specifically revised in conference by changing the language of the proscribed objective from "for the purpose of" to "where an object

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the unions restrain their employers from interstate purchases of goods which will diminish the need for union labor at the point of use. To cite an example from the books, there is the *Kitchen Cabinet* case in which a union refused to install kitchen cabinets painted by spray gun at the out-of-state factory rather than by brush on the job. Such restraints are all too common in the building trades, and many of those who readily sympathize with the refusal to work on non-union supplies are slow to countenance this other tactic. Not only does it restrain interstate 'business and commercial transactions' but it does so permanently—or until the union relaxes its grip or alters its objectives. . . ."

41. II Leg. Hist. 1367, 1455, 1511, 1579 (1947), 93 Cong. Rec. 4905, 4845, 5111-12, 6503.

thereof is." This was explained by Senator Taft as follows:[42]

> "Section 8(b)(4), relating to illegal strikes and boycotts, was amended in conference by striking out the words 'for the purpose of' and inserting the clause 'where an object thereof is.' Obviously the intent of the conferees was to close any loophole which would prevent the Board from being blocked in giving relief against such illegal activities *simply because one of the purposes of such strike might have been lawful.* . . ." (Emphasis added.)

It is abundantly clear, therefore, that Section 8(b)(4)(B),[43] expressly and by legislative design and purpose, applies to area product boycotts such as the Council's boycott of prefabricated doors in this case. And with this the Board agrees as to all jobs—except only the Frouge job, where it found no violation because of its "control" theory. No "control" limitation appears in the statute; neither was the "control" concept mentioned in any form in the hundreds of pages of legislative hearings, reports and debates from which 8(b)(4) emerged. It had not

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42. II Leg. Hist. 1623 (1947), 93 Cong. Rec. 6859. Critically confirming the reason for this change, Senator Murray (a strong opponent of the Act) stated [II Leg. Hist. 1579 (1947), 93 Cong. Rec. 6503]:

> "Finally it should be noted that the conference committee has substituted the language 'where an object thereof' for the language 'for the purpose thereof' as the test to be used in determining the legality of certain concerted activity by labor unions. The effect of this amendment is to outlaw as an unfair labor practice any strike or refusal to handle which has as any of its objectives a practice prohibited in section 8(b)(4). This amendment adopts a view even more restrictive than that followed by the courts in the days when the concerted activities of labor unions were subjected to prosecution under antitrust and conspiracy laws. Even under these decisions the test adopted by the court in determining whether union activity was unlawful was that of primary objective."

43. Before 1959, "(A)."

been a factor in the cases which led to the passage of the Act. What difference did it make in *Allen Bradley*, or in the *Kitchen Cabinet, Pre-mixed Concrete* and *Mill-Patterned Woodwork* cases, or in any of the other product boycott cases considered by Congress, whether the immediate employer of the boycotting employees was contractually free to capitulate to the union's boycott demands? None whatsoever. And the determinative criterion which emerged in the statute was the existence of a boycott objective—i.e., whether it was *an object* of the boycotting union to cause the immediate employer to embargo the products of another employer.

4. The Legislative Purpose Has Been Carried Out by the Courts and the Board[44] by the Enforcement of Section 8(b)(4) in Product Boycott Cases, Without Regard to the Factors of "Work Preservation" and "Control."

The course of enforcement of Section 8(b)(4)(A)[45] was charted by this Court's landmark decision in *Labor Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675 (1951), in which it was emphasized that the determination of the union's actual objectives is crucial, and that if *an* objective is proscribed, that is enough—it need not be the sole objective. There the boycotting union contended that it was engaged only in a lawful primary dispute with the immediate employer to enforce closed shop rules for the benefit of its members. The Court held that the union's conduct violated Section 8(b)(4)(A)[45] because *an* objective was that of forcing one employer to stop doing business with another.[46] The Court said (pp. 687, 689):

44. Until the Board's recent resort to the "control" theory.

45. Now Section 8(b) (4) (B).

46. This principle was reaffirmed the same day in *Electrical Workers* v. *Labor Board*, 341 U. S. 694, 700 (1951), wherein it was stated:

"The *Denver* case also covers the point that it was sufficient

"A. We must first determine whether the strike in this case had a proscribed object . . . ."

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"It was an object of the strike to force the contractor to terminate Gould & Preisner's subcontract.

"B. We hold also that a strike with such an object was an unfair labor practice within the meaning of § 8(b) (4) (A).

"It is not necessary to find that the *sole* object of the strike was that of forcing the contractor to terminate the subcontractor's contract. This is emphasized in the legislative history of the section. . . ."

In *Wadsworth*,[47] one of its earliest product boycott cases, the Board held that the existence of the proscribed objective of forcing a local contractor not to install prefabricated houses made by the Wadsworth Company was determinative of violation. The Board rejected the union's defense that its purpose was economically justified and necessary to protect wage scales in the territory, stating[48] (p. 806):

"However, both the express language of Section 8(b) (4) (A) and its legislative history disclose a contrary intention. In fact, not only does it appear from the legislative debates and Committee Reports that Congress considered the '*product boycott' one of the pre-*

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that *an* objective of the picketing, although *not necessarily the only* objective of the picketing, was to force Giorgi to terminate Langer's uncompleted contract and thus cease doing business with him on the project."

47. *United Brotherhood of Carpenters and Joiners of America (Wadsworth Building Company)*, 81 NLRB 802 (1949), enfd. 184 F. 2d 60 (10th Cir. 1950).

48. In his concurring opinion, Board Chairman Herzog commented on the legislative objective as follows (p. 821):

"It seems clear to me that Congress was attempting to deal a death blow to secondary boycotts, *whether for economic or for other objectives*, and desired to use all the power at its command to eliminate them from the American industrial scene. Evidence of that intention runs through the legislative history in both Houses. . . ." (Emphasis added.)

cise evils which that provision was designed to curb, but also Senator Taft, one of the sponsors of the Act, and Senator Ball, in reply to the critics of the section in question, emphasized without qualification that all boycotts were equally indefensible and unjustified. . . ." (Emphasis added.)

In the leading *Joliet Contractors* case,[49] there was an area boycott closely paralleling those in *Allen Bradley* and in the instant case. It was a typical "work preservation" product boycott. Glaziers' Union Local 27 had a basic rule that preglazed sash (windows with glass prefitted in the factory, rather than on the job) could not be installed, and that only open sash (window frames without glass) could be installed in the Chicago metropolitan area, which included Joliet.[50] The Seventh Circuit considered and expressly rejected the argument that the union's dispute with the contractor was only primary, and that its objective was only preservation of work on the job. The Court said (p. 610):

"Both the Board and the Union, so we think, place too much emphasis upon the contention that the activities of the Union and its members were primary and, therefore, permissible under the Act. Closely allied with this contention is the argument that the Union was engaged in the rightful endeavor to obtain more work for its members by preventing the use of preglazed sash on the job. . . . Whatever merit there may be in the premise upon which this argument is predicated, the fact remains that *the target was the use of preglazed sash, and any and all who handled, used or sold such sash were the intended and in many cases the actual victims of the Union's course.* Moreover, we are not convinced that a Union violation of

49. *Joliet Contractors Association* v. *NLRB,* 202 F. 2d 606 (7th Cir. 1953), cert. denied, 346 U. S. 824 (1953).

50. The union would permit the installation of preglazed windows only if the glass was knocked out and reglazed on the job or if the union was paid for equivalent time.

> the provision under discussion is dependent upon whether its activities are primary or secondary. . . ." (Emphasis added.)

The Court refused to get involved in legal semantics as to who is "primary" and who is "secondary" employer in this product boycott case. It emphasized that the controlling criterion was the fact that the *union's target was preglazed sash.* The Glaziers' Union had no labor dispute with any manufacturer or distributor of preglazed windows. It willingly worked on windows of any manufacturer if the windows were not preglazed. Its only rule was that all windows had to be glazed at the jobsite. This was construed as a rule against the handling or installation of preglazed products manufactured by other employers, and the union's refusal to install such products was found to be a clear-cut violation of Section 8(b) (4) (A).[51]

Sound Shingle[52] involved another product boycott situation in which an Oregon union refused to work on lumber from Canadian mills.[53] The boycotting union contended that it had only engaged in a primary dispute with the immediate employer, and that there was no dispute with any Canadian producer and, therefore, "there could be no secondary boycott under the Act." The Ninth Circuit rejected these contentions stating that, under the statute, *it is the objective of forcing an employer to stop using the products of another* that is determinative[54] (p. 152):

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51. Now "(B)."

52. *NLRB* v. *Washington-Oregon S. W. D. C.*, 211 F. 2d 149 (9th Cir. 1954).

53. Either because it was "nonunion" or "foreign."

54. Citing the *Allen Bradley* case and the Legislative History, the Board, in its decision below [*Washington-Oregon Shingle Weavers' Council (Sound Shingle Co.)*, 101 NLRB 1159, 1161 (1952)], had stated:

> "It is true that in the usual type of secondary boycott there is a dispute with one employer followed by secondary activity against another employer with whom he has business

"The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. *If that were true, it would not make the Union's conduct any more excusable.* The prohibited object of the boycott is stated by the statute to be 'forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *.' *That is a prohibited object* whether the union has or has not a dispute with such 'other producer, processor, or manufacturer.' In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, *the conduct would appear even more reprehensible.* . . ." (Emphasis added.)

In *Sand Door*,[55] the Carpenters Council of Los Angeles on a hospital job refused to permit installation of institutional doors made by the Paine Manufacturing Company of Wisconsin. The boycotting union did not represent Paine employees and was not trying to organize Paine employees. The union again contended that it was merely engaged in a primary dispute with the contractor to enforce a union-label rule. Nevertheless, it was held that, despite the absence of any union dispute with manufacturer Paine

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dealings, to force a cessation of business with the primary employer. But because this kind of secondary boycott is more usual or more frequent does not mean that it is the *only* kind Congress intended to reach. We do not believe that, as to the type of conduct now before us, Section 8(b) (4) (A) contemplates the existence of an active dispute, over specific demands, between the union, and the producer of the goods under union interdict. The legislative history surrounding the enactment of Section 8(b) (4) (A), while difficult as a guide in many respects, does furnish reasonably clear guidance on the precise issue here. The Senate Committee Report on this section indicates that no demand upon the producer of the boycotted product is necessary to sustain the charge that a union has engaged in the type of 'secondary boycott' we have here under consideration."

55. *Local 1976, United Brotherhood of Carpenters and Joiners of America (Sand Door and Plywood Co.)*, 113 NLRB 1210 (1955), enfd. 241 F. 2d 147 (9th Cir. 1957), aff'd 357 U. S. 93 (1958).

or with distributor Sand Door, *the union's objectives were to stop the handling of Paine's products,* to cause the contractors on the job to stop doing business with Sand Door, and to cause Sand Door to stop doing business with Paine.

Similarly, in *General Millwork,*[56] the Sixth Circuit Court of Appeals held illegal a Carpenters Union boycott of prehung doors much like the Council's boycott of prefabricated doors in the present case. In that case the union was trying to enforce a union rule preserving the hanging of doors for jobsite carpenters.[57] Although the union had a dispute with the immediate employers about a work-preservation rule and had no dispute with the manufacturers, the Court affirmed the Board's finding of violation because *an object* of the union was *to cause the immediate employers and others to stop handling and using the prefabricated doors.* Judge Stewart (now Justice Stewart) said (pp. 934-935):

> "Substantially adopting the Trial Examiner's Intermediate Report, a majority of the Board found the respondents had induced and encouraged employees of the subcontractors to engage in a concerted refusal to handle the prehung doors, and that objectives of the respondents' conduct were to force or require the subcontractors to cease using prehung doors, to force or require Erie Building Company to cease using and purchasing prehung doors, and to force or require Scholz Homes, Inc., to cease doing business with the manufacturers of the doors. . . ."
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> "The fact that there was not an active labor dispute between the respondents and the producers of the doors would not serve to immunize the respondents from the terms of § 8(b)(4)(A) of the Act, which

56. *NLRB* v. *Local 11, etc.,* 242 F. 2d 932 (6th Cir. 1957), enforcing 113 NLRB 1084 (1955).

57. The union also had a rule against nonunion products, but both the Board and the Court relied on the ban against prehung doors as such, as the proscribed objective.

neither literally nor implicitly requires the existence of such a dispute as a condition of its operation. *N. L. R. B.* v. *Washington-Oregon Shingle Weavers' Dist. Council*, 9 Cir., 1954, 211 F. 2d 149, 152-153."

In *York Corporation*,[58] the Board held that the Sheet Metal Workers Union's enforcement of a rule against the handling of prefabricated metal boxes violated Section 8(b)(4)(A) and reiterated the principle that, in product boycott cases, it is the union's target that is controlling —and not meticulous distinctions as to "primary" and "secondary" relationships. Citing the foregoing cases, the Board said (p. 685):

> "The foregoing authorities established that in a situation of the present type, it is unnecessary to assign the usual labels, 'primary' and 'secondary,' among the various contractors and subcontractors whose business relationships were being disrupted by the boycott activity. The fact that the evidence showed that the only dispute was with Limbach and that no demands were made upon York is, therefore, immaterial. For *since the Union's object was a proscribed one*, the terms of the statute make immaterial the nature of the dispute, *or even that a dispute exists with a specific primary employer*. . . ." (Emphasis added.)

5. The Changes in Section 8(b)(4)(B) Made by the 1959 Amendments Did Not Validate Product Boycotts Such as Were Previously Unlawful Under Section 8(b)(4)(A).

It is clear that the only purpose of the 1959 amendments to Section 8(b)(4) was to close certain loopholes that had developed since 1947. As strengthened,[59] new Section

58. *Clifton Deangulo (York Corporation)*, 121 NLRB 676 (1958).

59. The Act was revised, *inter alia*, to proscribe inducement of any "individual" (formerly "employee") employed by any "person" (formerly "employer") and "coercion" of any person. *Senate Committee Analysis*, I Legislative History of the Labor-

8(b)(4)(B) continued the same proscriptions against product boycotts. Neither in connection with the 1959 amendments nor otherwise was there any doubt expressed that boycotts of prefabricated products were and would continue to be unlawful. On the contrary, Representative Thompson, during his unsuccessful advocacy of the unions' "common situs" proposal, expressly acknowledged the continuing unlawfulness of such boycotts:[60]

> "This ["common situs" provision] would overrule *NLRB* v. *Denver Blg. & Constr. Trades Council* (341 U. S. 675). All true secondary boycotts in the construction industry would continue to be unlawful, *such as the refusal to erect prefabricated houses* or to work on nonunion goods." (Emphasis added.)

The Court's differentiation below between its finding of violation of Section 8(b)(4)(B) on the Coatesville Hospital, North Junior High School, and St. Aloysius Academy jobs and its finding of no violation on the Frouge job seems

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Management Reporting and Disclosure Act of 1959, p. 965 (hereinafter cited as "Leg. Hist. (1959)"). In reporting on conference action, Senator Kennedy said [II Leg. Hist. 1431 (1959), 105 Cong. Rec. 17898]:

> "The chief effect of the conference agreement, therefore, will be to plug loopholes in the secondary boycott provisions of the National Labor Relations Act. There has never been any dispute about the desirability of plugging these artificial loopholes. . . ."

To avoid any possible misunderstanding that Section 8(b)(4) was weakened, Senator Kennedy, in his statement concerning the Senate-House Conference Report on Section 8(e) and the proviso amendment, pointed out [II Leg. Hist. 1433 (1959), 105 Cong. Rec. 17900]:

> "This *proviso affects only section 8(e)* and therefore leaves unaffected the law developed under section 8(b)(4). The *Denver Building Trades* (341 U. S. 675) and the *Moore Drydock* (92 N. L. R. B. 547) cases would remain in force." (Emphasis added.)

To the same effect, see the statement of Senator Goldwater, II Leg. Hist. 1858 (1959), 105 Cong. Rec. 19772, printed in the record herein at page 136.

60. II Leg. Hist. 1577 (1959), 105 Cong. Rec. 15541.

to have been based on the view that the 1959 "primary strike or primary picketing" proviso *changed* previously existing product boycott law in this respect—i.e., created a new immunity for primary work-preservation disputes.[61]

We respectfully submit that the Court's apparent reliance on the proviso was misplaced. Authoritative legislative statements conclusively reveal that the purpose of the 1959 proviso was *to preserve,* and *not to change,* existing product boycott law. It did not create any new "primary" rights, nor did it take away any such rights—its purpose was strictly to maintain the *status quo* on picketing.

In *Rice Milling,*[62] this Court held that one reason why the picketing of a truck driver as he approached a struck plant was not a secondary boycott was that it did not induce "concerted" action by employees. The 1959 Landrum-Griffin Bill, as it went to conference, eliminated reference to "concerted" refusals and proscribed, rather, "individual" refusals. When the bill was in conference, fear was expressed by labor advocates that this change would reverse *Rice Milling* and make picketing of individuals at a primary-strike situs unlawful. To preserve *existing* law and to protect against *any change* in this respect, the pro-

61. In conjunction with its statement that the Union's conduct on the Frouge job "involved only a primary dispute with him [contractor Frouge]," the Court quoted Section 8(b) (4) (B), with emphasis on the "primary strike or primary picketing" proviso added by the 1959 amendments, and stated (R. 162):

> "We hold that Frouge was the object of a 'primary strike or primary picketing' and therefore the Union was entitled to the protection of the proviso in § 8(b) (4) (B)."

Later, in connection with its reference to its earlier decision in *Joliet Contractors Association* v. *NLRB,* 202 F. 2d 606 (7th Cir. 1953), the Court said (R. 163):

> "At that time the proviso in § 8(b) (4) (B) had not been enacted."

62. *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665 (1951).

viso was added in conference.[63] This was explained in the Conference Report as follows [I Leg. Hist. 942 (1959)]:

> "... (4) the amendment adopted by the committee of conference contains a provision 'that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' The purpose of this provision is to make it clear that the changes in section 8(b)(4) *do not overrule or qualify the present rules of law* permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing *at the site of a primary labor dispute that are in existing law....*'"[64] (Emphasis added.)

Thus, the only purpose and effect of the proviso was to preserve existing law as to picketing at struck plants. It created no new "primary" rights and took away none. Primary work-preservation disputes had not been, and did not become a defense when there was an objective of boycotting the products of other employers. The proviso had nothing whatever to do with the Board's "control"

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63. This statutory purpose of the proviso was confirmed by Mr. Justice Frankfurter in *Electrical Workers* v. *Labor Board*, 366 U. S. 667, 681 (1961), as follows:

> "The 1959 Amendments to the National Labor Relations Act, which removed the word 'concerted' from the boycott provisions, included a proviso that 'nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' 29 U. S. C. (Supp. I, 1959) § 158(b)(4)(B). The proviso was directed against the fear that the removal of 'concerted' from the statute might be interpreted so that 'the picketing at the factory violates section 8(b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the ... manufacturer during the strike.' Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589."

64. To the same effect, see House Report No. 741 on H.R. 8342, I Leg. Hist. 779 (1959).

criterion; rather, the then existing law, which did not include the "control" concept, continued in full force and effect.

Thus, after the 1959 amendments, as before, the existence of *a* proscribed objective is the controlling criterion of violation.[65]

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65. This principle was emphatically reaffirmed by the Board after the 1959 amendments in *Local 598 Plumbers & Steamfitters (MacDonald-Scott & Associates)*, 131 NLRB 787 (1961). There, the union claimed to have an agreement with the contractor that tunnel hanger supports would be constructed by its members in the field. The contractor purchased tunnels with prefabricated supports, and the union struck the job. The union's contention that its objective was merely the enforcement of a work-preservation agreement was flatly rejected by the Board (p. 800):

> "In their brief, the Respondents argue that the purpose of the work stoppage was to cause MacDonald-Scott or Scott Company to perform the alleged contract under which the Respondents claim they were promised the work of installing pipe hangers, including the so-called pipe hangers being fabricated and installed by Eaton. *How the Respondents conceived that this could be accomplished by Scott Company without causing it to cease using or handling the product of Eaton,* a party that fits the statutory description of 'any other producer, processor, or manufacturer' is not made clear.
>
> ". . . To say that the object of the Respondents was to induce or compel Scott Company *to assign the work of installing* the disputed supports to the Repondents' members in conformity to the U.A. form contract and not to force Scott Company to cease using Eaton's product or to cease doing business with Eaton is, on the facts here presented, to pretend that the latter object is not a necessary consequence of the former object. The two objects are inseparable. *It is immaterial that one objective might be legal if the other is illegal.*" (Emphasis added.)

See, also, *Sheet Metal Workers Int'l Assn., AFL-CIO, etc. (The Burt Manufacturing Company)*, 127 NLRB 1629, 1632-1633 (1960); *Int'l Union of Operating Engineers, Local 12 (Tri-County Association)*, 126 NLRB 688, 694 (1960).

6. The Application of the Board's "Control" Formula with Respect to the Frouge Job Herein Is Contrary to the Statutory Mandate of Section 8(b)(4)(B) that the Existence of a Proscribed Boycott Objective Is Determinative of Violation.

The Board and the Court below in theory accept the principle that, given the requisite inducement or coercion, the controlling criterion of violation is the boycott objective of the union. Further, by their findings of 8(b)(4)(B) violation, they seem to agree that if the union has *an* actual objective of boycotting the prefabricated products of another employer, there is violation, even though the union has no specific dispute with the manufacturer of the products and even though a reason for the boycott may be work preservation.

Thus, the Court below said that Section 8(b)(4)(B) clearly applies to the product boycott carried on by the Union in this case under Rule 17 and expressly found that "in the case at bar the Union's target was and is prefabricated doors" (R. 162-163). The Court viewed the Council's product boycotts on the Driscoll, McDonnell and Nason jobs in the Philadelphia area as essentially the same as Local 3's New York area boycott of electrical fixtures in *Allen Bradley*, the Glaziers Union's Chicago area boycott of factory-glassed windows in *Joliet Contractors*, and the Carpenters Union's Cincinnati boycott of prehung doors in *General Millwork*[66] (R. 162-165).

This brings in sharp focus the validity of the Court's holding that on the Frouge job, where the Union enforced the *same Rule 17* to accomplish the *same boycott* of prefabricated doors, the Union's target was not prefabricated doors but was only Frouge—because Frouge had

66. These product boycotts are the counterparts of the pre-Taft-Hartley boycotts involved in the *Kitchen Cabinet*, *Mill-Patterned Woodwork* and *Pre-mixed Concrete* cases (*supra*, pp. 24-27).

"control."[67] In so holding, the Board applied its "control" formula as *per se* determinative of objective on the Frouge job. This was the *only* basis for finding a different target in that situation.

The fallacy of this "control" rationale is that it makes the incidental factor of the extent to which the immediate employer could legally satisfy the union's boycott demands the determinative factor in ascertaining the union's objective. As demonstrated, under the statute and the cited cases, it is the existence of an *actual union boycott objective* which is controlling—and not the legal or economic ability of any particular employer to capitulate. It is apparent that a union can have a proscribed boycott objective, whether or not its attainment would cause the immediate employer to honor or breach his contracts with others.[68]

This "control" rationale has at times been employed by the Board as an aid in unscrambling obscure objectives in jobsite and common situs jurisdictional quarrels.[69] In these cases, where there was scant or no direct evidence of the union's actual target or objective, the "control" rationale

67. It is of interest to note that, at the time of the Union's assertion of the boycott, Frouge was not legally free to capitulate. He had already entered a contract commitment to purchase 3,600 prefabricated doors (R. 93).

68. The statutory proscription is against requiring any person "to cease using . . . the products" of a manufacturer—and not requiring any person "to cease using the products which he has a legal commitment to use."

69. In these instances, the Board frequently resorted to its "primary-secondary" dichotomy. For instance, in *International Longshoremen's Association, etc. (The Board of Harbor Commissioners)*, 137 NLRB 1178 (1962), aff'd 331 F. 2d 712 (3d Cir. 1964), the ILA members struck their stevedoring employer to get the work of moving frozen meat from the dock site to a freezer on a nearby part of the pier. The Board held that, since The Board of Harbor Commissioners controlled this work (which was being done by its Teamsters employees), The Board of Harbor Commissioners must have been the primary target of the striking ILA members because their immediate employer, Murphy, had no power to grant their demands.

was employed by the Board as a convenient formula by which to fix the union's boycott target. But whatever utility this "control" rationale may have as a formula or evidentiary guide in such cases, it has no proper application in a product boycott case where the direct evidence clearly demonstrates that the union is forcing the immediate employer not to handle the *products manufactured by someone else.* In such cases, there is no uncertainty as to targets—the boycott objective is readily apparent, irrespective of the fact that the union may have a purpose of work preservation also.[70]

When a boycott of prefabricated products is asserted, there is usually a dispute between the union and the immediate employer about handling the products—but the *subject matter* of the dispute is the *boycott of products* manufactured by *another employer.* Thus, the subject matter concerns an objective specifically proscribed by Section 8(b)(4)(B). The *union's pressure* on the *immediate employer* is *only the means* by which it seeks to accomplish the boycott of the *other employer's* product.

As has been previously demonstrated, it is not material

70. *Houston Insulation Contractors Association* v. *NLRB,* 357 F. 2d 182 (5th Cir. 1966), illustrates the extremes to which unlimited application of the Board's "work preservation" concept can lead. There the Court seems to have embraced the Board's view that the union had *only* an objective of work preservation. In so doing, the Court found itself drawn to what we submit are artificial and unrealistic distinctions between "object" and "result" and between boycotts of "premolded" fittings and boycotts of "prefabricated" fittings. We believe that this case was wrongfully decided and understand that a petition for certiorari seeking reversal is now before this Court. Be that as it may, the case is distinguishable from the present case in that the Court's decision did not involve the "control" doctrine. The Court there did not find *any* objective to ban the forbidden products. On the contrary, in the present case, the Court found that the Union did have the objective of banning prefabricated doors—but adopted the Board's view that the factor of "control" alone conclusively negated the existence of this proscribed objective on the Frouge job.

under the statute whether the union objects to the product because it is trying to organize or contract with the employer (as in *Wadsworth*), or whether it objects to the manufacturer's nonunion status (as in *Sand Door*), or whether it objects because of the manufacturer's location or the extent to which it prefabricated the products (as in *Allen Bradley, Joliet Contractors, General Millwork, MacDonald-Scott,* and the three jobs on which violations were found below). The crux of illegality is that the local union, for some reason, boycotts the products of other employers. In such situations, it is neither necessary nor relevant to get into the question of whether the local employer does or does not control whether the manufacturer's product will be used. The banned product is obviously the target—and this is true whether the immediate contractor bought the product voluntarily or under specification or whether his capitulation to the union's boycott demands did or did not breach, or cause him to change, a contract.

In a number of product boycott cases, the Board, with court approval, has viewed the immediate employer's complete lack of power to satisfy the union's boycott demands as an evidentiary indication that the union's real target was elsewhere.[71] In these cases, the lack of power by the

71. In *Ohio Valley Carpenters District Council, U. B. of C.* v. *NLRB,* 339 F. 2d 142 (6th Cir. 1964), *Local No. 5, United Ass'n of Journeymen, etc.* v. *NLRB,* 321 F. 2d 366 (D. C. Cir. 1963), cert. denied, 375 U. S. 921, *Local No. 636, etc.* v. *NLRB,* 278 F. 2d 858 (D. C. Cir. 1960), and *NLRB* v. *Enterprise Association, etc.,* 285 F. 2d 642 (2d Cir. 1960), the courts affirmed Board findings of violation because *an* objective of the boycotting unions was to force the immediate employer to stop handling the products of, or to stop doing business with, other employers. In none of these cases did the boycotting union have any specific controversy or dealings with the "other" employers, but in all there was substantial evidence that a real target was the boycotted products or the other employers. In all these cases, for one reason or another, it appeared that the immediate employer was "powerless" to grant the union's demand; and this, with other evidence, was considered in fixing the targets. But while the absence of "power" may indicate a different target, the presence of "power" in the immediate employer does not mean that all other targets must be excluded.

immediate employer *and other evidence* led to the conclusion that the union's target was other employers and their products. But the converse is not necessarily true. The fact that an immediate employer may be legally able to capitulate to a union's demands does not necessarily mean that he is the sole target. A boycotting union may have several targets,[72] and the existence of one lawful objective does not conclusively negate the existence of proscribed objectives.

The fallacy and artificiality of treating "control" in the immediate employer as the absolute determinant of object is apparent from its application in the present case. Boycott Rule 17, by its express terms, was directed against prefabricated doors and the manufacturers of such doors:

> "No member . . . will handle material *coming from a mill* where cutting out and fitting has been done . . . *nor any doors* . . . which have been fitted prior to being furnished on job. . . ." (Emphasis added.)

Not only did Rule 17, by its terms, prohibit prefabricated doors *on all four jobs,* but the Union, by its enforcement of Rule 17 actually prevented the use of prefabricated doors *on all four jobs.*

As we have seen, the Court below and the Board unequivocally found that, as to the first three named jobs, "the Union's target was and is prefabricated doors" (R. 163, 29). But it is clear that the Union had exactly the same proscribed target on the Frouge job as on the other three. The only way that the Union's goal, under Rule 17, could be accomplished was to force Frouge to stop using prefabricated doors—which it did! Frouge was forced to stop using over 600 prefabricated doors, which had already

72. In most product boycott cases, the courts found that the union had at least two, and usually more, objectives: One was usually some form of union self-interest; and the others were proscribed objectives.

been varnished and prepared for installation, and ship them elsewhere (R. 15-16).

In such a situation, the factor of "control" cannot, as a matter of law, be a determinative distinction because, with or without it, the proscribed objective of banning pre-fabricated doors remains. The Board's "control" notion, by ignoring the existence of the proscribed objective, does not obliterate it—i.e., Frouge's contractual freedom to capitulate to the Union's boycott demand did not change the force or the direction of the Union's proscribed objective of banning prefabricated doors.[73]

As we have demonstrated, in none of the product boycott cases which led to the enactment of Section 8(b) (4) (B)[74] in 1947 and in none of the product boycott cases thereafter until this new Board theory has the factor of "control" in the immediate employer been considered determinative of the Union's objective. As we have seen, it made no difference in the congressional consideration of *Allen Bradley* whether the contractors were or were not free to buy the "foreign" products.[75] Congressional criticism was directed against the union's demonstrated objective of banning such products. Similarly, it made no difference in *Joliet Contractors* and *General Millwork* whether the contractors had "control" of purchases because the demonstrated objectives of the unions in these cases were the embargo of factory-glazed sash, in the first case, and the banning of prehung doors, in the sec-

73. Contractors Nason (St. Aloysius Academy), Driscoll (Coatesville Hospital), and McDonnell (North Junior High School) could have breached or canceled their specifications for Hardwood and Oxford doors, just as Frouge breached or canceled his order for Mohawk prefabricated doors—but all that would have been only an incidental feature or effect of the Union's accomplishment of its boycott of prefabricated doors.

74. Then "(A)."

75. The Court below agreed (R. 162).

ond. For exactly the same reason, Frouge's so-called "control" made no difference because the Union's demonstrated objective in his case, as on the other three jobs, was the embargo of doors prefabricated elsewhere.

We, therefore, submit that the Board's "control" concept, as applied herein, would, as a matter of law, erroneously write into Section 8(b) (4) (B) a limitation precluding recognition of *existent* proscribed objectives which is contrary to the decisions of this Court and the courts of appeals that (given requisite inducement or coercion) the existence of *a proscribed objective* is determinative of violation.

B. THE BOARD'S "CONTROL" FORMULA WOULD WRITE INTO SECTION 8(b)(4)(B) IMMUNITY FOR UNION BOYCOTTS INIMICAL TO THE ECONOMY AND THE PUBLIC INTEREST.[76]

The steady and substantial growth in the use of prefabricated building products is common knowledge.[77] A major reason for this has been the technological and cost advantages of prefabricated products over jobsite fabri-

76. As it did in the Court below, the Board may argue that this Court should not be concerned with the adverse economic effects and the public detriment which result from product boycotts, such as the Union enforced in this case. We suggest that, on the contrary, the effectuation of congressional objectives in enacting this provision requires consideration of economic consequences. The constitutionality of the statute itself rests on its prevention of obstructions of the free flow of commerce. *Labor Board* v. *Fainblatt*, 306 U. S. 601, 604 (1939). More specifically, congressional criticism of union boycott abuses which led directly to the enactment of Section 8(b) (4) (B), originally and as amended, was based in large part on the adverse effects of such restraints economically and on the public interest. I Leg. Hist. 569, 583 (1947); II Leg. Hist. 1351, 1491 (1947); II Leg. Hist. 1469, 1470, 1581, 1670, 1671 (1959) (R. 126-132). Moreover, as the late Justice Cardozo once observed: "Consequences cannot alter statutes, but may help to fix their meaning." *In re Rouss*, 221 N. Y. 81, 116 N. E. 782, 785 (1917).

77. United States Department of Commerce, *1963 Census of Manufacturers, Millwork and Prefabricated Structural Wood Products*, pp. 24B-9, 24B-13, 24B-15. (Footnote continued on next page.)

cation.[78] This components evolution has been described as the "home-building's version of the industrial revolution through which the manufacturing industries passed decades ago." The advantages derive from assembly-line techniques, mechanization, and specialization.[79] This evolu-

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House & Home, p. 92 (November 1963):

"PREFABRICATION HAS BECOME HOUSING'S NO. 1 BUILDING METHOD"

"Something close to 20% of all one-family starts this year will involve the output of some 750 home manufacturers. And virtually all of the other 80% of houses—though built by conventional builders—will be built with at least some prefabricated parts.

"For example: more and more builders use prehung doors and windows, trusses, and prefabbed staircases. Of the 20,000 major retail lumber yards in the U. S., 12,000 are supplying components to builders. . . ."

78. *Practical Builder*, pp. 105, 106 (April 1964):

"One of the biggest, most overlooked sins in building today is the waste and misuse of motion, muscle and time at the job site."

• • •

"If builders want to keep house prices competitive, they must reduce on-site labor wherever possible. . . ."

• • •

"To date the most common answer to the cost problem has been the rapid adoption of components by builders. A recent study by the Bureau for Building Marketing Research of structural components, revealed the following usages by builders: Roof trusses—63%; wall panels—32%; partition panels—25%; pre-hung doors—46%; window walls—20%; roof panels—7%; floor panels—7%; box beams—17%. . . ."

79. *Building Supply News*, p. 100 (March 1965). This report also states (pp. 99, 100, 103):

"On-site carpentry is guilty of waste in time and materials and is being replaced by a revised technology. During 10 years, the percentage of houses built by the 'prefab' industry has increased from about 10 percent to 22 or 23 percent."

• • •

"Pre-hung door units, the second most-used components, are prime examples of the component evolution and its benefits in cost reduction. Originally doors were handmade at the site. Then early mills began to 'prefabricate' them."

• • •

tion not only is essential for the well-being of the construction industry and the consuming public, but is responsive to an unavailability of enough hand-labor workers to do the job.[80]

Prefabrication and factory assembly also is rapidly evolving in many other industries. Increasingly, such products as boilers, elevators, oil-refining equipment, sheet metal conduits and fixtures, electrical conduits, acoustical systems, air-conditioning and heating units, insulation fittings, and many other products and components are being prefabricated and assembled at the factories.

Prefabrication reflects a most salient characteristic of American capitalism. New products and improved methods are constantly being developed, creating new opportunities for investment, employment, and economic growth, but also requiring adjustments as obsolete methods are re-

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"Like trusses, the advantages of millwork components are obvious. And they are even more universal than the benefits of trusses. Pre-hung doors can be used in virtually all houses and prefabricated window components may be used in almost any room of a single-family house."

80. See *Manpower Report of the President, 1964*, pp. 196-198; and *AFL-CIO News*, p. 3 (January 19, 1963).

Practical Builder, p. 106 (April 1964), reports:

"And the problem [housing costs] may become even more acute as a shortage in labor develops.

"Housing demand is estimated at 2,000,000 units in 1970—a 25% increase over the near-record 1963 building pace.

"According to the AFL-CIO, construction in '70 will need 720,000 carpenters, 145,000 electricians, 212,000 plumbers, 180,000 masons—but by the union's own estimates there will be only 538,000 carpenters available, 117,000 electricians, 168,000 plumbers, 149,000 masons. The AFL-CIO also estimates worker production will increase on an average of 2% a year—hardly enough to offset the growing shortage and rising costs, using today's construction methods.

"Unless there is a radical change by 1970, today's $12,000 house will sell for $15,000; today's $16,000 house will go to $20,000 and today's $24,000 unit will rise to a neat $30,000—and these prices do not include possible increases in land costs."

duced. In the long run, this operates to the advantage of all workers.

The importance of this process of technical change upon the American economy was stated by Ambassador Arthur J. Goldberg, when he testified as Secretary of Labor before a subcommittee of the House of Representatives Committee on Education and Labor in 1961, as follows:[81]

> "As a people, we have benefited from technological change and rising productivity. In the past 50 years, for example, gross national product per capita, that is, the total of private and public goods and services available per person, has more than doubled. . . .
>
> "New industries have arisen during this time. New products and services have made for an easier way of life—the automobile, plastics, antibiotics, better homes, and travel are a few examples.
>
> "All of this indicates why automation and other technological progress is so important to the American economy and why it may be necessary to step up the pace rather than tone it down."

The Board's new "control" theory would open a new wide loophole of immunity in Section 8(b)(4)(B). Trade unions could engage in boycotts of prefabricated doors and other products with impunity by the simple expedient of requiring contractors to operate under "open" product specifications.[82] The Electrical Workers Union involved in *Allen Bradley* could resume its boycott of prefabricated electrical fixtures in New York whenever contractors had "control" of the purchases. The Glaziers Union involved in *Joliet Contractors* could resume its boycott of unspecified preglazed windows in the Chicago and Joliet metropolitan

81. Rep. of Subcom. on Unemployment and the Impact of Automation, House Comm. on Ed. & Lab., 87th Cong., 1st Sess., *Impact of Automation on Unemployment*, 3-4 (Comm. Print 1961).

82. See example of such a contract in *Local 5, United Association of Journeymen, etc. (Arthur Venneri Company)*, 137 NLRB 828, 846 (1962).

areas.[83] The Carpenters Union involved in *General Millwork* could resume its boycott of prehung doors in Cincinnati. Thus, if this new "control" limitation on Section 8(b)(4)(B) is permitted to stand, unions throughout the country will be enabled to draw boycott walls around their respective communities, banning technologically improved products and construction methods—to the great prejudice of the industries involved and the public interest.

CONCLUSION.

For the reasons set forth above, we submit that the Union's boycott of prefabricated doors on the Frouge job violated Section 8(b) (4) (B), and that the Court's decision below to the contrary should be reversed.[84]

Respectfully submitted,

CHARLES B. MAHIN,
Counsel for National Woodwork Manufacturers Association, et al.

September 6, 1966.

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83. As the Court stated [193 F. 2d 833, 840 (7th Cir. 1952)]: "... if the Union is permitted to pursue its illegal objective, the sale of preglazed material in the Joliet area will become a thing of the past, as it has in the Chicago area."

84. This is the issue raised by the Petition for Certiorari in Cause No. 110. The Court's finding below that Union Rule 17, and the Union's enforcement thereof, violated Section 8(e) and Section 8(b)(4)(A) will be supported by NWMA in response to the Board's brief in Cause No. 111.

APPENDIX.

EXCERPTS FROM LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947.

(Published by U. S. Printing Office.)

Page 428: S. Rep. No. 105 on S. 1126, 80th Cong., 1st Sess. (April 17, 1947).

"Section 8 (b) (4): In this section it is made an unfair labor practice for a labor organization or its agents—

> to engage in, or induce or encourage the employees of any employer to engage in, a strike or a concerted refusal to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services in the course of their employment—

if the purpose is to force the doing of certain things. The proscribed purposes or objectives of a strike or boycott are described in paragraphs (A), (B). (C) and (D) of this subsection.

"Under paragraph (A) strikes or boycotts, or attempts to induce or encourage such action, are made violations of the act if the purpose is to force an employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of another, or to cease doing business with any other person. Thus, it would not be lawful for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B; nor would it be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of or does business with employer B (with whom the union has a dispute).

This paragraph also makes it an unfair labor practice for a union to engage in the type of secondary boycott that has been conducted in New York City by local No. 3 of the IBEW, whereby electricians have refused to install elecrical products of manufacturers employing electricians who are members of some labor organization other than local No. 3. (See testimony of R. S. Edwards,[85] vol. 1, p. 176 *et seq.; Allen Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, 325 U. S. 797.)"

Page 482: S. Minority Rep. No. 105, Pt. 2, on S. 1126, 80th Cong., 1st Sess. (April 22, 1947).

"No one who has undertaken to examine the law with respect to secondary boycotts can help but be impressed with its present confusion. Nonetheless, an unmistakable trend in the law on this subject is recognizable. Courts are beginning to turn from the practice of considering secondary boycotts in terms of common law conspiracy doctrine, and are determining the legality of particular factual situations on the basis of tort doctrine. On this basis there is a growing acceptance of certain forms of action directed against parties who are not immediately involved in a labor dispute when (1) such parties are found to possess 'unity of interest' with the disputing employer, and (2) such action is found to be necessary in order to promote the legitimate interests of the labor union.

"This bill would reverse that trend. Under this bill, a refusal by union labor in one craft to handle products made by nonunion labor in the same or a related craft would be an unfair labor practice. A strike by union labor in order to compel their employer to cease dealing with a nonunion employer would be an unfair labor practice. A refusal of union workers to work next to nonunion

85. See excerpts printed, *infra*, pp. 65-67.

workers of another employer engaged in a common project would be an unfair labor practice. In each of these situations the efforts of the unionized workers are primarily directed at protecting their own organizations, and their wage and hour standards against the destructive competition of nonunion labor. This bill ignores valid distinctions between justified and unjustified boycotts based on the objective of the union in carrying on such a boycott and the relationship of the boycotted employer to the disputing employer. It indiscriminately bans all such boycotts, whether justified or not."

Page 876: 93 Cong. Rec. 6296 (Rep. Javits, June 3, 1947).

"Under the extremely wide definition of boycotts in the bill, unions cannot protect themselves against strikebreaking within the same industry. The bill provides that workers may not refuse to handle or work on any goods for the purpose of forcing their employer to cease handling the goods of another producer, but that other producer may be in the same line of business, his employees may be out on strike and he may be using the first establishment to work on his goods as a means of strikebreaking. This provision is not only bad, but summary power is vested in any regional attorney of the NLRB to get an immediate court injunction to restrain any such legitimate refusal to handle 'hot goods,' and the protection of the Norris-LaGuardia Anti-Injunction Act, for which labor fought for 50 years, is removed in such a case. This is not the kind of boycott which is contrary to the public interest, that other kind results from a misguided labor union's efforts to keep certain goods out of a market because the labor union fears the effect of new inventions or new methods. But while dealing with this legitimate abuse, the bill also has the effect of depriving labor of a right of self preservation which has never been questioned before."

Page 1056: 93 Cong. Rec. 4132 (Senator Ellender, April 28, 1947).

"Another example is the New York Electrical Workers Union, the IBEW. That union has become so powerful that it has organized not only those who make the electrical equipment but those who receive it from the factory and install it. As a matter of fact, no employer who manufactures electrical equipment outside of New York has a ghost of a show of having his equipment placed in the large buildings in New York City. When such equipment is sent to New York City, the IBEW local refuses to install it unless it is permitted to tear all the equipment apart and assemble it again. Of course, one can readily understand that such procedure is unconscionable and that it results in high costs to those engaged in the erection of office buildings, homes, and stores; in fact, all sorts of buildings requiring electrical equipment."

Pages 1005-06: 93 Cong. Rec. 3834 (Senator Taft, April 23, 1947).

"The difficulty with the Clayton Act and the Norris-LaGuardia Act is that they went at the situation with a meat ax. They practically eliminated all legal remedy against unions for any action taken by them. In effect they provide as construed by the courts, at least —that any action by a union taken in order to advance its own interests is proper, and there is no legal recourse against the union. The laws referred to do not discriminate between strikes for justifiable purposes and strikes for wholly illegal and improper purposes. They do not distinguish between strikes for higher wages and hours and better working conditions, which are entirely proper and which throughout this bill are recognized as completely proper strikes, and strikes in the nature of

secondary boycotts, jurisdictional strikes, and strikes of the racketeering variety. The acts simply eliminated all remedy against any union, leaving the union leaders free, practically without any control even by their members, to order strikes and boycotts and various kinds of actions that interfered, I believe certainly unlawfully under common law, with the activities of many other persons who were entirely innocent."

Page 1491: 93 Cong. Rec. 5011 (Senator Ball, May 12, 1947).

". . . The only kind of action which the Secretary was willing to recommend was one dealing with secondary boycotts in jurisdictional strikes where the boycott was directed against a specified union. That would not touch at all one of the worst situations which has arisen, such as that in New York where a local of the IBEW is using the secondary boycott to maintain a tight little monopoly for its own employees, its own members, and a few employers in that area. The Secretary admitted that he had nothing further to offer."

Pages 1106-1109: 93 Cong. Rec. 4198-4199 (Senators Pepper and Taft, April 29, 1947).

"[Mr. Pepper] The language would forbid one man or one agent of a labor union going to the employees of another employer working on a product put out by a manufacturer who would be unfair to them, in their opinion, and attempting to persuade or to induce those workers not to handle the output of the factory in which there was a disagreement with the workers. I claim that the right of an organization to persuade, if it can, to petition, and to seek the cooperation of fellow workers is the legitimate right of an American citizen; and, Mr. President, they are being denied not only the right to seek the cooperation of

other workers in self-defense but, in my opinion, they are being denied their essential civic rights of addressing themselves to their fellow citizens about anything they want to present to them.

"Mr. Taft: Mr. President, will the Senator yield?

"Mr. Pepper: I yield.

"Mr. Taft: I do not quite understand the case which the Senator has put. This provision makes it unlawful to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement between an employer and his employees. The Senator will find a great many decisions written by my father which hold that under the common law a secondary boycott is unlawful. Subsequently, under the provisions of the Norris-LaGuardia Act, it became impossible to stop a secondary boycott or any other kind of a strike, no matter how unlawful it may have been at common law. All this provision of the bill does is to reverse the effect of the law as to secondary boycotts. It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice."

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(Senator Taft, answering Senator Pepper's contention that sympathetic strikes should be permitted.)

"Mr. Taft: In the first place, of course the Senator's first assumption is not correct, because under the Wagner Act the workers have the right to organize and to require the employer to bargain with them; and if the employer fails or refuses to do so, his action in that respect is an unfair labor practice.

"But passing over that, and assuming that the employer has a contract with the employees, and that the only difference is over wages, let me say that the principal point of the Senator from Florida is similar to that in the case of the New York Electrical Workers' Union, which said, 'We will not permit any material made by any other union or by any nonunion workers to come into New York City and be put into any building in New York City.' The principle announced by the Senator from Florida would make that stand lawful, as it is lawful today.

"Of course we propose to change the law in that respect. . . ."

• • •

"[Mr. Pepper] . . . The committee bill outlaws all kinds of so-called secondary boycotts, even when the objective of the boycott is to preserve wage and working condition gains already achieved by collective bargaining, even if the objective be to solicit in a peaceful way the cooperation of other workers in defending the wage and working standards of a particular community of industry."

• • •

"Now, Mr. President, I wish to refer to pages 14 and 15 of the bill, and to page 27 of the report of the committee. The committee had before it the President's recommendation when it reported the bill, it knew the President had limited his suggestion for the outlawing of secondary boycotts to boycotts in aid of the jurisdictional strike, of which none of us approve. But it deliberately was not satisfied with the moderation and with the limitation of that principle in the President's recommendation; it chose to go further and to outlaw all secondary boycotts, no matter how legitimate the objective of the boycott was. So again I say that many of us, and certainly I speak for myself, are not opposing all legislation, we are not approving all secondary boycotts, but we say, as the President

said, that a distinction should have been made, and the distinction should have been predicated on what the objective of the boycott is. That distinction the able committee has ignored.".

Page 569: H. R. Conf. Rep. No. 510 on H. R. 3020, 80th Cong., 1st Sess. (June 3, 1947).

"Section 301 of the House Bill contained a provision amending the Clayton Act so as to withdraw the exemption of labor organizations under the antitrust laws when such organizations engaged in combinations or conspiracies in restraining of commerce where one of the purposes or a necessary effect of the combination or conspiracy was to join or combine with any person to fix prices, allocate costs, restrict production, distribution, or competition, or impose restrictions or conditions upon the purchase, sale, or use of any product, material, machine, or equipment, or to engage in any unlawful concerted activity. . . . Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement."

EXCERPTS FROM HEARINGS BEFORE THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE ON S. 55 AND S. J. RES. 22.

80th Cong., 1st Sess.

Pages 176-180, 188: Statement of Robert S. Edwards (January 29, 1947).

(Incorporated by reference in Senate Report No. 105, *supra*, p. ——.)

"In brief, the boycott we are objecting to operates like this: The A. F. of L. International Brotherhood of Electrical Workers controls the labor that installs electrical construction materials of all kinds. This IBEW refuses to install and brings pressure on contractors and wholesalers to prevent them from handling any of these electrical construction materials unless they have been manufactured by IBEW labor in the original plants.

"In other words, no matter who makes the product or where it is manufactured or how far it travels through the channels of trade, this union stands as the all-powerful barrier between the manufacturer and the ultimate consumer."

• • •

"Since 1934 this local No. 3 has built up such a beautiful, fenced-in paradise for itself that it has not been able to resist the temptation to boycott the work of members of its own IBEW brothers in manufacturing plants located in other parts of the country. There is no pretense that their boycott is to protect against any substandard competition. It is purely for the purpose of strangling all competition. . . ."

• • •

"Senator Pepper: Now when management tries to sell those products manufactured by those employees into the New York market, the local of the IBEW in New York City will not handle their products?

"Mr. Edwards: That is right, sir.

"Senator Pepper: Why? For what reason?

"Mr. Edwards: Because they are not made by their own workers of IBEW No. 3. They are not interested whether they are made by the CIO, by an independent union, by a nonunion, or even by their own union.

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"Senator Pepper: Does that mean no electrical fixture is installed in the city of New York that is not made in the city of New York?

"Mr. Edwards: No, with one exception. If a manufacturer outside of New York is willing to send his fixtures in and have them dismantled and the wire taken out of them, and then a local No. 3 member put[s] them back together again and rewire them, then they will sell them."

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"It is claimed that these boycotts are simply the free and independent choice of a worker to refuse to handle or work on nonunion goods. The brief I have filed shows plainly and gives substantiating evidence that the IBEW boycott is applied only in a slight degree, a very slight degree, against nonunion goods. It finds its chief application against not only CIO-manufactured goods but against the goods manufactured by its own IBEW union members in other cities."

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"*Allen-Bradley Co.* v. *Local Union No. 3, I. B. E. W.*, was an attempt by electrical manufacturers to eliminate this trade restraint. The Supreme Court found that since the union, in this particular case, had conspired with

electrical contractors and local electrical manufacturers to enforce control of the market they were guilty of a violation of the Sherman law. However, the Court pointed out that if the union had acted alone, the restraint was permissible under the provisions of the Clayton Act, as interpreted in the light of the Norris-LaGuardia Act, and cast entire responsibility for correcting this situation on Congress."

EXCERPTS FROM LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959.

(Published by the National Labor Relations Board.)

Page 942: H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess. (September 3, 1959).

". . . (4) the amendment adopted by the committee of conference contains a provision 'that nothing contained in clause (B) of this paragraph (4) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.' The purpose of this provision is to make it clear that the changes in section 8(b) (4) do not overrule or qualify the present rules of law permitting picketing at the site of a primary labor dispute. This provision does not eliminate, restrict, or modify the limitations on picketing at the site of a primary labor dispute that are in existing law. See, for example, *NLRB* v. *Denver Building and Construction Trades Council, et al.* (341 U. S. 675 (1951)); *Brotherhood of Painters, Decorators, and Paper Hangers, etc.*, and *Pittsburgh Plate Glass Co.* (110 NLRB 455 (1954)); *Moore Drydock Co.* (81 NLRB 1108); *Washington Coca Cola Bottling Works, Inc.* (107 NLRB 233 (1953))."

Page 1577: 105 Cong. Rec. 15541 (Rep. Thompson, August 11, 1959).

"'Section 702(c) would amend the National Labor Relations Act in such a way as to permit a building-trades union to picket a construction project on which a contractor is working with whom the union has a labor dispute even though employees of other contractors working upon the same job refuse to cross the picket line. This would overrule *NLRB* v. *Denver Blg. & Constr. Trades Council* (341 U. S. 675). All true secondary boycotts in the construction industry would continue to be unlawful, such as the refusal to erect prefabricated houses or to work on nonunion goods.''